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The politics of the Digital Single Market: culture vs. competition vs. copyright

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ABSTRACT

This paper examines the implications for European music culture of the European Union's (EU) Digital Single Market strategy. It focuses on the regulatory framework being created for the management of copyright policy, and in particular the role played by collective management organisations (CMOs or collecting societies). One of the many new opportunities created by digitalisation has been the music streaming services. These depend on consumers being able to access music wherever they are, but such a system runs counter to the management of rights on a national basis and through collecting organisations which act as monopolies within their own territories. The result has been 'geo-blocking'. The EU has attempted to resolve this problem in a variety of ways, most recently in a Directive designed to reform the CMOs. In this paper, we document these various efforts, showing them to be motivated by a deep-seated and persisting belief in the capacity of 'competition' to resolve problems that, we argue, actually lie elsewhere – in copyright policy itself. The result is that the EU's intervention fails to address its core concern and threatens the diversity of European music culture by rewarding those who are already commercially successful.

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Introduction

The Single European Market (SEM) aims to establish a genuine single market by allowing for the free movement of goods, labour, services and financial services. In this context, the European Union (EU) has increasingly explored the opportunities and confronted the problems presented by the advent of digital technology since the 1990s, culminating in the EU's Digital Single Market (DSM) strategy. The DSM is not driven by the movement of physical objects, but the allocation and exploitation of rights, many of which are the result of copyright.

Despite these efforts, the digital market is yet to be realised. One example of this is the online music market (European Commission, 2005, p. 5). The Commission has come to the view that the music market is not working to its full capacity, especially when

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compared to the U.S. (European Union, 2014, recital 5). It has identified the geo-blocking of media content, which makes digital content unavailable across borders, as a key barrier to the effective functioning of the DSM (European Union, 2015). A main source of this under-performance has been attributed to the collective management organisations (CMOs), the bodies (also known as the collecting societies) responsible for collecting and distributing authors' royalties. A key European Commission (EC) policy initiative has been the reform of the regulation of CMOs.

Our paper seeks to reveal how the EC adopted its current approach to the regulation of CMOs and to assess its impact. We suggest that the EC's response, and its limitations, can best be attributed to its determination to see 'competition' and competition policy as the default solution to such problems. We attribute this behaviour to the effect of historical institutionalism.¹ This is the phenomenon, widely endorsed within policy science, of institutions remaining committed to particular policy instruments, often captured in the idea of 'path dependency'. The resort to competition, we argue, has meant both that the EC fails to resolve the difficulty it confronts and that it actively harms the wider music culture by reducing diversity.

Historical institutionalism and the notion of path dependency

Historical institutionalism sees institutions 'as relatively persistent features of the historical landscape and one of the central factors pushing historical development along a series of "paths"' (Hall & Taylor, 1996, 941). Institutions shape the world view of actors and frame the set of feasible policy solutions by providing the background against which new challenges are interpreted. They also establish the power inequalities which determine who and what type of ideas can influence the policy process (Hall & Taylor, 1996, pp. 937–938). Based on these assumptions, historical institutionalism proposes that key decisions in the past set a precedent for future policy options: those policy options that were not chosen become ever more unlikely in the future as the cost of radical change is high.

This picture of policy stability and continuity is qualified by the introduction of 'critical junctures'. These are deemed to lead to the creation of new paths (Hall & Taylor, 1996, p. 942). A critical juncture, changes in the context within which institutions and policies operate (Steinmo, Thelen, & Longstreth, 1992), including the socio-economic background, the balance of power and the impact of major external events. However, none of these factors pre-determines how change will occur. Historical institutionalist research has, though, identified a series of patterns. These have been commonly grouped as: (1) displacement – traditional frameworks are discredited and replaced by new ones; (2) layering – some part of the systems have become practically unchangeable and so new parts form around them; (3) drift – institutions shift from their original functioning and meaning over time; (4) conversion – existing institutions are redirected to new goals, function and purposes and (5) exhaustion – the gradual breakdown of the institution leading to its collapse (Streeck & Thelen, 2005).

A critical juncture does not, however, always imply change. It is possible that despite significant pressure to change, the choice is made to stay with the prevalent equilibrium (Capoccia & Kelemen, 2007, p. 352). Either way, the policy behaviour needs to be explained, because critical junctures serve to open up the choices available to the powerful and magnify the consequences of their decisions (Capoccia & Kelemen, 2007, p. 352).

In what follows, we explore the extent to which the EU's policy on copyright, and especially CMOs, has over time conformed to the historical institutionalist perspective. We examine the development of the policy on CMOs, its underlying reasoning and the tools deployed. We reveal how the competition paradigm that was established early on has permeated every part of it and remains dominant, despite significant changes in the policy context. This has consequences for copyright policy and Europe's cultural industries, as well as for the DSM.

We begin by providing the background to collective management for musical works, including the role of CMOs. By doing so, we identify the status quo which has dominated since 1992. We then identify the external shock to the system, namely the challenges created by the rise of digital technology and its impact on copyright management. Using the historical institutionalist perspective, we trace the main EU-level responses chronologically, seeking to identify the dominant current in thinking. In the final part of this analysis, we focus on the 2014 CMO Directive and how the past has shaped it. We also identify the shortcomings of the EU's approach and its negative effects on the creative workers in the music market. We suggest that the EU's response is another case of institutional path dependency. We argue that the policy on regulating CMOs has experienced layering – in the sense that part of the system has been treated as sacrosanct, albeit in different guises. As a result, the more familiar competition principles were continuously relied upon to resolve the issue of CMO regulation, deviating from the member states' approaches which emphasise the link between collective management and copyright law. Most of the policy's shortcomings can be explained by this omission.

CMOs and copyright

Copyright has long been understood as key to the viability of the creative industries (Frith, 1988; Wikstrom, 2009, p. 12). It provides its owner with control over the use of the work (typically, the song) by third parties² and therefore the ability to charge for its exploitation. As a result, it shapes the cultural industries by giving authors and various intermediaries something to sell and to generate revenue, making it, in the words of the U.K. music industry's representative body, the 'currency' of the creative industries (UK Music, 2010).

In the music industry, copyright owners can be grouped into two categories: those protected for their creative and artistic contribution; and those who benefit on the basis of their investment and role in the economic exploitation of the work. The former – composers and lyricists – are usually not well placed to exploit economically their art. They therefore assign their copyright, in return for a share of the revenue, to a publisher, often a large corporation (Barnett, 2014). This publisher then ensures the further exploitation of their music, including various forms of distribution. Playing music in public (whether by broadcasters or in shops) requires permission from the right holder, which is usually granted in return for a fee (royalty).

CMOs are central to this process. Their function is to provide users with licences, to collect the royalties and to distribute them to their members (the copyright owners), as well as to monitor the use of works to ensure that those who owe royalties actually pay them (Haunss, 2013, p. 1). They are able to lower transaction costs and provide economies of scale in the administration of rights because licences for similar users are practically

identical. The same information has to be investigated to determine use, and the cost of adding more works to the databases is very low (Handke & Towse, 2007, p. 3).

To exploit fully the potential of lowering transaction costs, CMOs exist in almost all EU member states as legal or practical monopolies (Drexler, Nérissou, & Trumpke, 2013, p. 325). In return for the advantages of having exclusive access to a market, CMOs are in some jurisdictions required to do more than serve the private interests of their members.³ CMOs have been expected, for example, to provide social benefits in the form of trade union style collective bargaining with users or to contribute to state cultural policy by cross-subsidising less popular music genres (Handke & Towse, 2007, p. 1; Haunss, 2013, p. 1; Towse, 2003, p. 73). Finally, some CMOs have a 'solidarity function' as they also provide social insurance, such as hardship funds or even pensions (Ficsor, 2002, pp. 47–48).

Because of their monopoly status, and prior to the rise of digital technology, CMOs have been subject to regulation at EU level.⁴ The Commission has resorted to the competition provisions in the treaties to influence the behaviour of CMOs via the courts. Competition was, after all, central to the ethos of the SEM. Two dominant principles of CMO regulation were settled between the early 1970s and mid-1990s. First, case law established that CMOs had to treat their members equally and to minimise the restrictions they imposed on them. Secondly, CMOs were required to provide licences for users as far as this did not limit their ability to function (Kretschmer, 2005b, pp. 14–15).⁵ Both of these are typical competition remedies to the risk of abuse of power by a monopolistic actor. Key here is that the monopoly itself was justified by the efficiency of the system.

The mounting crisis: the impact of the technological revolution on copyright and its management

The system established for collective licencing came under pressure from the digital revolution. For the CMOs, this was felt most acutely when it came to cross-border arrangements. Although CMOs could licence foreign works via reciprocal agreements⁶ with their partner organisations, they could only issue licences for their own territories. The internet, however, is not confined to national borders, and those who use the internet to distribute music legally, for example via streaming services, find themselves having to deal with multiple agencies, leading to high transaction costs. As a result the development of legal services remained difficult.

The erosion of the self-contained national territory has undermined the CMO's claim to operate as a justified national monopoly (Katz, 2006). In a borderless digital world, the national monopoly status of the CMO has become increasingly cumbersome for those seeking to licence works for multi-territorial use. In addition, the practice of geo-blocking has become ever more anachronistic, frustrating users who have paid for services that they cannot access once they cross a national border.

Pressure for change has also come from the CMOs' members, the right holders. Online transactions generate significantly less revenue than analogue ones have done, leading to claims of loss of income for (and hence discontent among) right holders.⁷ A major example here is the example of GEMA⁸ refusing to licence YouTube. This was only resolved recently after seven years of dispute (Nicola, 2016). At the same time, digital technology has started to undermine the claim of CMOs to add value to the licencing process

through the effective monitoring of use. Digital technology has enabled online usage to be monitored more easily. As a consequence, large-scale copyright owners, especially music labels and publishers, now have the capacity to self-administer their rights, cutting out the intermediary and therefore reducing the administration costs (Cooke, 2015; Karp, 2014).

With the potential and the challenges posed by digital technology, the need for an effective system of cross-border collective management system has become increasingly apparent to EU policy-makers. In principle, the EU had to choose between two courses of action. The first was to use competition law to regulate CMOs. This would involve drawing on established case law dealing with competition issues, especially monopoly abuse. The other possibility was to rely on copyright law and its principles. After all, licencing is a direct result of copyright protection – a fact recognised in member states which often link copyright aims to the regulation of CMOs. In addition, the early 2000s was marked by significant momentum in the field of copyright harmonisation, culminating in the Information Society (2001/29/EC) and the Enforcement (2004/48/EC) Directives which addressed copyright and its enforcement more broadly (Schroff, 2014; Stamatoudi & Torremans, 2014). The difference between relying on copyright and relying on competition principles depends on the aims attributed the policy. Copyright, especially in the continental civil law systems, favours the creator, as opposed to third parties.⁹ CMO regulation here is about ensuring that there is a viable legal alternative to unauthorised uses, ensuring authors got their fair share of the revenues generated. Competition law, on the other hand, conceptualises the all right holders as one, irrespective of their role in the creative process.¹⁰ Instead, the focus is on overall licencing efficiency without emphasising the needs of creators. This different focuses has major implications in practice, as the analysis will show.¹¹ In the end, the Commission adopted the former option, albeit with a shift of focus that created an additional institutional layer.

The competition solution holds sway

Despite the progress made on harmonising copyright policies, the issues relating to the licencing of works remained unaddressed. In essence, the regulation of licencing arrangements remained a member state prerogative. In the Recommendation 2005/737/EC, the Commission asked its member states to reform the licencing market. It recommended basic standards in internal administration, including the principle of non-discrimination between categories of right holders; equitable, fair and transparent distributions; and balanced internal decision-making rules (Guibault & Van Gompel, 2015, p. 141). Where before CMOs were charged with managing rights within their own national territory, the Commission proposed a cross-border licencing system as well as enhanced competition within the collective management of rights (Graber, 2012, p. 8). These measures were supplemented by the need for transparency and best practice governance rules to ensure a fully functioning market (Kretschmer, 2005b, p. 16). As a result of these proposals, right holders would be free to choose the CMO that they wanted to use for both the type of performance and the EU territory (Graber, 2012, p. 8). This in turn should, following the Commission's logic, enable copyright owners and users to shop around for the CMO that best suited their needs (Handke & Towse, 2007, p. 5), leading to efficiency gains as a result of competition.

In adopting this approach, the Commission had rejected the option of reforming copyright law. The 2005 Recommendation relied on the use of competition language (Kretschmer, 2005b, p. 5) and saw increased competition between CMOs as the solution to the multi-territorial licencing problem. These competition law remedies followed the existing case law closely, giving priority to freedom of choice and the principle of non-discrimination. But for this solution to work, it was necessary for the CMOs to be transparent about how they operated; competition could not operate if there was no way to evaluate the rival services.

While the Commission remains wedded to the competition solution, the nature of that 'competition' changed. Where before competition was used before to limit the abuses of a justified monopoly towards those relying on it (the copyright holder and the user), this time its target became relations between CMOs. The assumption was that the monopoly itself was the problem, and that competition between CMOs was the answer.

Re-thinking 'competition'

The system did not change noticeably as a result of the EC's formal Recommendation: multi-territorial licences remained elusive. In fact, the CMOs had cemented the status quo in the CISAC model contracts¹² they used with each other. The contract stated that (1) CMOs could only accept members of their own territory without the consent of another CMO; (2) they could only issue licences within their own territory and (3) they could not intervene in the territory of another CMO (Guibault & Van Gompel, 2015, p. 161). However, this approach fell foul of the Commission in 2008. In its competition decision, the Commission criticised the resultant, artificially segmented market which was seen to undercut competition between CMOs, detrimentally affecting the SEM. The practice was found to be anti-competitive (European Commission, 2008), although the decision was successfully challenged in 2013 (CISAC, 2013).

Overall, the CISAC model contract decision represented a strengthening of the policy shift first identifiable in the 2005 Recommendation. Right holders were to be free to choose the CMO which suited them best. As digital technology could enhance the monitoring capabilities of CMOs, the Commission argued that the continued reliance on market separation and monopolies was misplaced (European Commission, 2008, p. 21). In other words, the legitimacy of the CMOs' monopoly status lost its legitimate basis in the online environment in the eyes of the Commission (although not the CJEU as the appeal showed [CISAC, 2013]). At the same time, the CISAC decision did not attack the previously established notion that CMOs needed to be subject to controls in respect to the terms and conditions they imposed on members and users alike. As a result, the Commission's approach can best be described as two-fold: facilitate competition between CMOs while at the same time ensuring that they do not abuse their dominant position in the market.

This approach, however, had significant implications for copyright owners in practice. The Commission had argued that copyright territoriality should be respected (European Commission, 2008). After all, copyright had only been subject to minimum harmonisation at EU level, leaving significant variation between member states. In particular, copyright laws to this day vary in the extent that they protect creative authors from the stronger negotiation power of commercial intermediaries, such as publishers, when copyrights are assigned. This difference in approach extends to the regulation of CMOs at the

national level. For example, Germany mandates CMOs to fulfil specific social functions to the benefit of authors (not commercial intermediaries) while the U.K. does not.¹³ By ignoring such differences, the Commission failed to see that CMOs were not competing on a level playing field. The result was unintended pressure on a fine tuned system with little regard given to the potential consequences.¹⁴

Formal legislation: instituting CMO competition

Despite earlier interventions, progress remained minimal at best (European Union, 2014, recital 6). The result was the 2014 CMO Directive, covering both the governance of CMOs in general as well as the multi-territorial licencing of musical works in particular (Part III). When the Directive is examined from the right holder perspective, the provisions clearly revealed a number of themes, including freedom of choice, the focus on governance and the need for transparency.

To see what the Directive means in practice for someone with copyright claims, we explore the key elements of the Directive, comparing what it proposes with the current practice of major European CMOs. By doing so, we reveal the shortcomings of the Directive.¹⁵ It also allows us to anticipate the likely effect the Directive is going to have on stakeholders. This in turn feeds into our subsequent discussion of the impact of the Directive's approach on the music sector and the creative industries more broadly.

We draw on empirical evidence generated by an examination of the major European music CMOs. We have chosen CMOs from the three largest member states: the U.K. (PRS/MCPS), Germany (GEMA) and France (SACEM). In addition, because efficiency is a major concern in copyright royalties' collection, we have selected Spain (SGAE) where the CMO has been subject to criticism for alleged inefficiencies. This particular choice of case studies also reflects a variety of legal traditions in copyright protection, notably both civil and common law ones. The primary sources used are the governance documentation available for each of the CMOs, including statutes, annual reports and any other information they provide.

Principle 1: Rights assignment

The central principle in the Directive is the idea that copyright holders should be free to choose to whom they assign their rights. The Directive insists that every right, category of rights or type of work assigned has to be specifically mentioned in the contract between the member and the CMO, and any of them can be amended or withdrawn within a reasonable time limit (European Union, 2014, articles 5(4), 5(6) and 5(7)). As a result, CMOs cannot demand a general assignment of those rights without providing further options and providing copyright owners with the opportunity to change their mind. In terms of copyright, this means that right holders need to be able to assign the different rights that they hold in a way that maximises the benefit for them, whatever form this may take.

Our evidence shows that the assignment and withdrawal of rights will remain a bottleneck. First because all the CMOs we examined already comply with the Directive in that they permit the partial assignment of rights. However, the effect is limited by how it is done. Early in the contracts and articles of association, it is assumed that all works, including all future ones and all relevant rights, are assigned to the CMO. Limitations along the

EU's prescribed lines receive almost no attention. The administrative documents we examined presume a full rights assignment and list withdrawal options separately and often at the end of the agreement, weakening the effect of the latter. The Directive is unlikely to change this. The Directive only states that partial assignment options have to be available, but not that they should be given the same prevalence as a full assignment. Where the Directive is likely to make a difference is in the waiting times. SACEM and GEMA have assignment intervals of 10 and 3 years, respectively. This will have to be changed under the Directive which defines reasonable withdrawal periods as six months, or at the end of the financial year (European Union, 2014, article 5(4)).¹⁶

In summary, there is currently a mismatch between the intentions of the Directive and the practices of CMOs. While the withdrawal periods are likely to speed up, the low profile given to withdrawal options is unlikely to change when the Directive is implemented. Overall, it is therefore not clear if the Directive does strengthen the hand of the right holders. In fact, in not giving more prominence to the new options of withdrawal, little effect is likely.

Principle 2: The right to choose

The second main pillar of the EU's policy is the freedom for copyright owners to choose the CMO they prefer. The Directive seeks to ensure this by setting minimum standards for CMO membership rules. This is why the Directive insists that: (a) CMO statutes or membership terms cannot discriminate against members based on nationality or residence; (b) CMOs are obliged to manage rights of new members in the same way and (c) any refusal to manage rights has to be based on reasoned and objective grounds (European Union, 2014, articles 5(2) and 6). Copyright owners should, therefore, be free to choose their CMO within the EU, and the CMOs should have membership rules that allow for the exercise of this choice. In other words, customers are expected to 'vote with their feet' (Hirschman, 1970) by choosing the CMO most suitable for them, revealing their preferences as a result.

The CMOs we examined meet the basic criteria for membership. PRS, GEMA and SGAE require that the member belongs to a relevant profession – a composer, for example, has to have composed works that contribute to the societies' repertoire. They also insist that members have EU citizenship or residency. This openness is not surprising as the principle of non-discrimination is enshrined in the European Treaties and is one of the key concepts in European law. It would be unlikely that any discrimination between EU citizens/residents would be upheld by the courts.

However, SACEM is more limiting in this respect. It only pays royalties to members, but to qualify as a member your music must have been performed in public at least five times in the last six months (SACEM, 2012). This is a significant barrier for the less successful musicians, especially if they have not been signed by a label or publisher (both of whom can help to promote their music). In practice, these thresholds mean that the choice of CMOs is limited for the less successful artists. It is also unlikely that CMOs will actively compete for this group of artists as administrating their works is significantly more costly than those of successful ones.¹⁷ As a result, the incentive for right holders to move CMOs is weakened. The Directive fails to harmonise this area sufficiently to counteract this effect.

Principle 3: Transparency of the internal organisation

Competition in the collective management of rights also depends on ‘transparency’ for those who are choosing between CMOs. Transparency gives access to information, and hence to the possibility of effective scrutiny both by members and the wider public. The Directive requires CMOs to make available information on key aspects of their internal administration, including membership statutes, royalty rates, as well as distribution and complaints procedures (European Union, 2014, article 21). Annual transparency reports are also to be published (European Union, 2014, article 22). By making this information public, it is assumed that right holders have access to the information they require to determine which CMO suits them best.

GEMA, PRS, SACEM and SGAE comply with the Directive’s requirement. However, ‘compliance’ does not mean complete transparency. The required standard is too low to satisfy the needs of right holders. The Directive allows that information about the distribution of royalties be available to members, but not to the public (European Union, 2014, article 18). However, this is exactly what right holders need to know if they are to select the most suitable CMO for them. Secondly, a further limit to transparency concerns language. The Directive allows information to be published in the national language only. In fact, France’s SACEM publishes its annual reports in English, but GEMA’s information is available just in German. The same applies to SGAE’s use of Spanish. The lack of translated material limits right holders in their choice of CMO outside of their national borders. Competition between CMOs is unlikely to resolve this issue. CMOs have not readily embraced competition and since they are not required to provide translations, the language barrier provides a convenient way to safeguard the status quo.¹⁸ In addition, maintaining their documents in several languages is expensive, affecting the cost of administration.¹⁹ Finally, to make CMOs comparable for users and potential members, and for competition to work, it is necessary to have all the information available in a comparative manner. It is not.

Principle 4: Decision-making

The Directive also requires members to be represented within the CMO. This means allowing them to exercise influence on its decisions, and hence to exercise some degree of scrutiny over its procedures and policies. Again, the underlying assumption is that competition provides the incentives for the necessary reforms. By allowing members to choose their CMO and to participate in the decision-making, it is expected that the CMO will become more efficient in meeting the demands of a DSM. If they did not, members would leave for CMOs with more effective governance provisions.

The Directive stipulates that members should participate actively in the decision-making process, and that representation of the different categories of members be ‘fair and balanced’ (European Union, 2014, article 6(3)). The empirical evidence shows that the influence of a member on the decision-making process varies with the membership category. The lowest category of members tends to have no influence on the decision-making within the CMO. For example, those who qualify for the minimum threshold category offered by PRS or SACEM have no voting rights in their respective General Assemblies. In fact, full voting rights are often limited to full members only. This is

the case with GEMA, whose full members constitute 5.25% only of the overall membership.²⁰

In practice, more successful, high-earning members have more influence on the process – either by being categorised into a higher membership category²¹ or by having their votes weighted according to income levels as SGAE does. The second key consideration tends to be duration of membership. GEMA, for example, requires at least five years membership (GEMA, 2013, p. 168) and SACEM three years to qualify for a higher category (SACEM, 2012, p. 34). It also determines access to the services offered by CMOs. GEMA, for instance, restricts access to the hardship funds to full members of at least five years (GEMA, 2013, pp. 421–422). Finally, PRS, SACEM and GEMA also restrict who can stand for committee membership or other leadership offices.

The Directive is unlikely to have a real impact on this because it assumes that members may occupy different categories and may be subject to differential treatment as a result (European Union, 2014, article 6(9)). In fact, the Directive gives no indication as to how representation is to be realised and what ‘fair and balanced’ actually means. Thresholds relating to years of membership in particular are a disincentive to ‘vote with your feet’. Their existence weakens, if not eliminates, the incentive to switch CMOs, and hence fails to create the competitive pressure that EU reform intends.

The limits of the competition solution

We have shown that the backbone of the Directive is formed by four competition-based principles: the freedom to assign rights to any CMO; the right to join CMOs; transparency and participation in the decision-making. The individual components represent a unification of the two distinct approaches formerly established.

On one hand, they implement the notion of CMOs competing against each other. The first two principles essentially establish the ability of the right holder to choose the CMO they prefer for each exploitation. While the rights assignment provisions ensure right holders can withdraw their rights from one CMO, the right to join CMOs ensures that CMOs cannot collude to exclude members and therefore separate out territories by the backdoor. After all, CMOs are only forced to compete with each other if right holders can vote with their feet and assign their rights as freely as possible to reflect their preferences. Both of these can be traced back directly to the earlier intervention of the 2005 Recommendation and the CISAC decision: the licencing system will become more efficient if CMOs compete with each other.

The inter-CMO competition is bolstered by the principle of transparency. Transparency reduces the potential of the dominant actor to negatively affect stakeholders. At the same time, the information made available to right holders under the transparency requirement also enables right holders to choose the CMO that matches their preferences most closely. This originated in a weaker form in early case law as a means to prevent the abuses by a monopoly actor. However, the notion that information is to be shared more broadly gained prominence in the 2005 Recommendation and the CISAC decision. Finally, early case law is also reflected in the fourth principle: participation in the decision-making process. By giving members control over the decision-making, abuses of the membership are to be restricted. In this sense, it is a formalised notion of earlier case law which recognised the danger of a monopolistic actor towards its members.

The Directive does not only institutionalise the competition-based approach to the regulation of CMOs and licencing, it cements its separation from copyright. Rather than conceptualising CMOs as part of the wider copyright system, the language and remedies chosen are a clear reflection of the competition-based approach and therefore a narrow focus on licencing in the name of efficiency (rather than, say, cultural diversity). However, this omission poses significant danger to right holders, especially those involved in the creative process.

These limitations can be traced back to the Commission assumption that competition between CMOs for members provides the solution to cross-border licencing. In other words, it is assumed that the system will be efficient if the CMOs compete to attract members on the basis of membership preferences, while at the same time ensuring members can exercise some control over the institution, limiting the potential for abuse. However, this assumption is itself based on an over-simplified view of copyright stakeholders, and the idea that there is a common interest among right holders. The Directive repeatedly refers only to the term ‘right holder’, treating them as a single category (European Union, 2014, article 3 (definition), article 4 (general principles), articles 5 and 6 (rights)). CMOs are treated in a similar way, with no distinction being made, for example, between for-profit and not-for-profit forms of the CMO.²²

In practice, the interests of copyright owners vary significantly, particularly between individual and corporate owners of rights (Boldrin & Levine, 2008; Frith & Marshall, 2004; Kretschmer, Klimis, & Wallis, 1999; McLeod & DiCola, 2011; Rosati, 2013). For corporate owners, copyright has the main purpose of safeguarding the economic return on an investment, namely maximising their profits (Kretschmer, 2003). The same economic interest is shared by composers and lyricists, especially successful ones (Höffner, 2010), although not to the same extent.²³ To ensure an economic return for corporations, the distribution of works has to be limited to those who pay for it. However, for musicians there is value in easy access to the work of others – as sources of inspiration or instruction.²⁴ Artists’ reputation and popularity may be enhanced if their songs are played or performed widely (Kretschmer, 2003). There is, therefore, only a partial overlap between the interests of the author and that of the corporate owner (Stahl, 2013).

These differences in the interests of copyright owners are reflected in the preferences for how the rights are administered. Corporate right owners, and indeed established authors, prefer management organisations that administer rights efficiently – in other words cost-effectively and accurately (Ficsor, 2002, p. 22). The focus is on the licencing, collection and transfer of royalties as accurately as possible, with strongly individualised remuneration for its members and without any collective component, especially social or cultural funds (Ficsor, 2002, p. 12).

By contrast, less commercially successful authors have different interests, similar in a way to those of trade union members. They look to the organisation to strengthen their collective bargaining position because of their individual weakness relative to the large corporations (Kretschmer, 2005b, p. 4). As a result, they seek a different type of organisation. The traditional and most common solution is the management of these rights by a CMO. In this capacity the CMO also acts as a lobbying organisation, representing their members in public debate and in pushing for effective protection (Handke & Towse, 2007, p. 10).²⁵ These types of organisation also have additional public policy objectives, including for example the pursuit of cultural diversity and support for the well-being of their members (via hardship funds and the like). While the rights owning members still have an interest

in the effective administration of those rights, they are at least disposed to accept higher deductions from their royalties so that these additional roles can be fulfilled.

These conflicts of interest have traditionally been resolved within the CMO by applying the principle of solidarity. CMOs require all right holders to pay the same fee for the administration of their rights. However, there are two aspects of CMOs that make the administration of less popular works more costly overall than those of successful ones. First, the monitoring of less popular works is more costly than that of widely used songs.²⁶ As a result, the administration cost is higher for unknown works than for the popular ones. Secondly, offering social benefits also creates administrative costs, again raising the overall cost of the administration.²⁷ But while the whole membership pays for these provisions, it is mainly the less successful artists who rely on the social benefits – for example, hardship funds. As a result, the traditional (quasi) monopolistic CMO membership model relies on cross-subsidies: the more successful authors cross subsidise the less successful ones, lowering the cost of administration for the latter while increasing their own.

As a result of the earlier case law and the Directive, these conflicts of interest that would previously have been resolved within a single institution are now channelled through a system based on the competitive resolution of that conflict. The indicator used by right holders to assess the efficiency of a CMO is the administration rate; that is, the percentage of revenue which is deducted from the royalties by the CMO for the administration of rights and maintaining the CMO's functions. Assessing CMOs this way has two effects. First, right holders with valuable rights prefer efficient management to help maximise their revenue, and to achieve this CMOs may be required to reduce social spending as it detrimentally affects their overall administration rates.²⁸ At the same time, some CMOs are required by national legislation to provide social and other benefits to members (irrespective of the value of their rights). This has the automatic effect of increasing administration rates to meet their statutory obligations, making them less attractive in comparison to other CMOs without the same responsibilities.

Secondly, the introduction of competition shifts the battle lines and the interests of the competing parties. This means, in effect, that corporate publishers, with their easily administered works and superior bargaining power, have an interest in a CMO that offers them an individually negotiated administrative rate (Kretschmer, 2005a, p. 29). Such preferences gain importance as publishers, as a result of the digitalisation revolution, have the capacity to monitor and collect royalties for the most lucrative areas (broadcasting and mechanical reproduction). In fact, large publishers – including the largest, Universal – have already withdrawn some of their individual rights (Mazziotti, 2011, p. 771). Most importantly, the withdrawal of rights is highly selective: the publishers only withdraw those rights which can be administered at the lowest cost and leave the more costly ones with the CMO (Mazziotti, 2011, p. 793).

By allowing right holders to withdraw their rights, these are now able to vote with their feet and choose the CMO that suits their preference for low administration costs most closely. When this happens, the CMOs are losing the most valuable works which de-facto cross-subsidise the less well-known ones (see note 26). As a result, the administration costs for everyone else increases, making the CMO even less attractive to successful artists and large right holders. Were this to happen across the board with all of the popular repertoire, then the universal service, in which every member is deemed to have access to the CMOs and to pay the same administration fee, may collapse (Kretschmer, 2005a, p. 21).

To give an indication of what is involved in such a collapse, we analysed the different services that CMOs provide, beyond that of collecting, licencing and distributing rights and royalties. All of our CMOs offer support for upcoming musicians, express a commitment to cultural diversity and support the promotion of music. This is perhaps not surprising. These three functions are closely related to their business model (and their self-interest). Supporting young musicians facilitates the creation of new works and helps to safeguard the future repertoire. Cultural diversity helps to expand the repertoire. And promoting the cultural importance of music legitimates the activities of the CMO. However, while self-interest might provide part of the explanation, it is notable that the actual level of these activities varies significantly. The precise numbers are difficult to establish, but some trends are clear.

The best comparable data are available for 2011. The German GEMA spent €41.6 m on social purposes at this time, including pensions, hardship funds and promotion. That is the equivalent of 5.9% of the distribution in that year. In 2013, it increased to 6.3%. At the same time, SACEM spent €45.6 m on social action (equivalent to 7% of its distributable income) and the Spanish SGAE spent 9.6%. Compared to this, the U.K.'s PRS spent less than 1% on social policies in the late 1990s and only devoted £1.5 m (€1.86 m) to social spending (hardship fund and promotion) between 2011 and 2013 – this is 0.3% of its overall spending.

In such a context, relying on a competition-based approach is problematic. It oversimplifies the dynamics of stakeholder interests and as a result poses serious risks to the functioning of CMOs as a whole, in particular their contribution to the social and cultural policy of member states.

Conclusion

This paper has provided a detailed case study of cultural policy and cultural policy-making. It has traced the EU's attempt to provide for the interests of consumers and creators in the digital era. In particular, it has focused on how the EU, in pursuit of its DSM strategy, has sought to reform and regulate the means by which rights (a key element of the DSM and the creative industries) are collected and distributed.

What we have noted, in documenting the narrative history of EU reform of rights policy and in evaluating current policy against the backdrop of current practice, is that the Commission has resorted to its default policy instrument of increased competition. Our study has revealed that this approach leads to significant policy weaknesses that impact negatively on stakeholders. In our analysis, these weaknesses are largely the result of omitting the link between copyright law and collective management, in particular not accounting for the differences in interests that copyright owners have. The result is a system which is unlikely to serve the smaller (and, in practice, the vast majority of) right holders to the same extent that it will benefit larger and more successful ones. This in turn may have detrimental consequences for the DSM as the market cannot work smoothly without the involvement of a network of CMOs. In other words, by attempting to resolve one issue (cross-border licencing), the DSM may be hampered by the negative effects of this policy, in particular the unintended consequences for the social and cultural policies of member states and the EU, and for the cultural landscape of Europe more generally.

Notes

1. A similar approach was taken to the evolution of U.S. and Canadian copyright law by Haggart (2014).
2. A song as it sold contains three sets of rights. First, there are the musical composition and lyrics which are protected by copyright. The right is by default owned by the authors (creators) and commonly assigned to a music publisher when the song is commercially exploited. When the song is for example played in public or streamed, all three share the revenues collected by CMOs. In addition to copyrights in the music itself, the recording of the song as such is also protected but by a different right: the phonogram right. This right is owned by the producer, usually the music label. These rights are managed separately either directly by the label or via a separate CMO. It is important to note that the CMO Directive and this article do not affect the management of the phonogram rights as the market situation differs significantly from the licencing issues affecting music copyrights. For a more detailed explanation of how the two markets differ and the challenges they face, see Galuszka (2015), pp. 260–265.
3. This ‘requirement’ can be either defined by statute but also by tradition. Even if a CMO is not legally required to provide social benefits to its members, it may be expected to do by its members.
4. Some limited areas such as the term of protection and neighbouring rights were subject to EU regulation, however the scope was too narrow to consider copyright an area of EU competence.
5. Kretschmer (2005b) also summarises the relevant case law in this area.
6. A reciprocal agreement is concluded bilaterally between two CMOs. Its terms permit CMO A to license the repertoire of CMO B within the jurisdiction of CMO A and vice versa. In practice, CMO A has this kind of agreement with CMOs in nearly all other states. As a result, CMO A is in effect able to license the world-wide repertoire to users active in its own jurisdiction. See also Mazziotti (2011), p. 763.
7. For a sceptical overview of these claims, see Marshall (2015).
8. GEMA is the German CMO licensing the rights in a musical work and the lyrics.
9. Copyright laws often contain legal provisions protecting the creator against third parties. For example, civil law countries often restrict the contractual freedom of creators to assign their copyrights in an effort to protect them. However, even common law countries tend to interpret contracts narrowly. See for example: *Robin Ray v Classic FM* [1998] E.C.C. 488, at 489; *Gribrook v MGN* [2011] E.C.D.R. 4, at 104–105.
10. For a detailed discussion of how the interests of ‘right holders’ vary, see section ‘The limits of the competition solution’.
11. See section ‘The limits of the competition solution’.
12. CISAC is the global umbrella organisation for CMOs. It facilitates the cooperation between national CMOs, not least by providing them with a model contract that regulates the terms and conditions CMOs apply to their reciprocal agreements between each other.
13. For a detailed description of the underlying issues, see the later section on ‘The limits to competition as a policy tool’.
14. The danger of these pressures was raised early on; see for example Kretschmer (2005b).
15. In general, member states had until 10 April 2016 to implement the CMO Directive, meaning that changes are likely to bring the governance of CMOs into line with EU requirements.
16. It is not clear how the competition between CMOs affects withdrawal periods at this point.
17. For a detailed account of how the administration cost is related to success, please see section ‘The limits of the competition solution’.
18. The cooperation between CMOs have been continuously scrutinised by the EU as breaches of competition, not least in the online domain. Most notably, the model contract that structured bilateral agreements was found contrary to competition by the Commission (CISAC case). Particularly relevant here are the clauses on membership restrictions (CMOs can only accept members from its own jurisdiction, leading to essentially national repertoires), national allocation (CMOs can only provide licenses for their own territory) and non-intervention clause

(CMOs are only available in their own jurisdiction, defined at the national territory) (European Commission, 2008, pp. 126, 140–141, 207). On appeal, the CJEU permitted the national delineation of CMO activities (CISAC, 2013). Since then, the status quo has not been subject to major changes, explaining the need for the CMO Directive in the first place. As a result, it cannot be presumed that CMOs seek to compete with each other.

19. On the relevance of the administration cost as well as how it affects CMOs, see section ‘The limits of the competition issues’.
20. This percentage was calculated from the membership information published by GEMA in its Yearbook (2013, p. 45).
21. Only GEMA and PRS publish the details Full membership of GEMA, for example, is subject to an income threshold (€30,000 in 5 years and a minimum per year (GEMA, 2013, pp. 168–169); Full membership of PRS requires an income of €27,627 over 3 years in 2013. In SACEM, full members, the income threshold is twice that of professional members (SACEM, 2012, p. 37).
22. A CMO has to be owned/controlled by its members and/or organised on a non-profit basis. The directive also allows for Independent Management Organisations which are for profit and/or neither owned or controlled by its members (European Union, 2014, article 3).
23. For example, a fall in the sale of CDs as a result of piracy/home taping is mainly a problem for popular musicians and does not affect every artist to the same extent (Litman, 1987).
24. This is most evident in that copyright does not protect ideas but only the expression of them. This idea–expression dichotomy ensures that information and knowledge which are essential to the creation of new works can spread freely while at the same time preventing free-riding on the author’s work.
25. The conflict between publishers and authors also naturally limits the function of CMOs to act like trade unions for its creative members.
26. For a detailed description of how popular works cross-subsidise less well-known ones, see especially Kretschmer, Klimis, & Wallis (1999, p. 183); Handke and Towse (2007, p. 10) and Mazziotti (2011, pp. 791–793).
27. This issue is most visible in the ‘social deductions’ that CMOs have to fund their social policies. While these are already subject to debate domestically, applying social deduction to the repertoire of other CMOs is highly contentious. After all, these foreign artists cannot benefit from the social provisions. The issue has proven highly contentious over the years and the CISAC model contract, which underlies most reciprocal agreements, currently permits for 10% social purpose deductions.
28. The more services you provide, the more administration is required and therefore the higher your administration rate.

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